

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**





*Affidavit*

# 77-6057

To be argued by  
LESLIE R. BENNETT

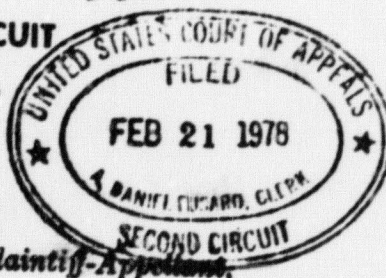
## United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-6057

MEEVIN J. COHEN,

*Plaintiff-Appellant,*



—v.—

JOSEPH A. CALIFANO JR., Secretary of Health,  
Education and Welfare,  
*Defendant-Appellee.*

*B P/S*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

### BRIEF OF DEFENDANT-APPELLEE

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**United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

**Docket No. 77-6057**

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MERVIN J. COHEN,  
*Plaintiff-Appellant,*

—v.—

JOSEPH A. CALIFANO, JR., Secretary of Health,  
Education and Welfare,  
*Defendant-Appellee.*

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**BRIEF OF DEFENDANT-APPELLEE**

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**Preliminary Statement**

Plaintiff-appellant Mervin J. Cohen ("Cohen") brings this appeal, *pro se*, from a judgment entered on February 25, 1977, pursuant to an opinion and order of the Honorable Charles S. Haight, United States District Judge of the Southern District of New York, dated February 23, 1977, granting judgment on the pleadings in favor of the defendant-appellee, Joseph A. Califano, Jr., Secretary of Health, Education and Welfare ("the Secretary").\* The opinion, which was filed on February 24, 1977, is unreported but is reproduced as an Addendum to this brief.

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\* Joseph A. Califano, Jr. succeeded David Mathews, the defendant below, as Secretary of Health, Education and Welfare on January 25, 1977, and the caption of the appellee's brief has been modified to conform to this state of facts pursuant to Rule 43(c) of the Federal Rules of Appellate Procedure.



### **Issue Presented for Review**

Did the District Court err in finding that the Secretary's decision that Cohen was not entitled to retirement insurance benefits for the period June 1971 through January 1972 was supported by substantial evidence?

### **Statement of the Case**

#### **A. Prior Proceedings**

Cohen, a self-employed insurance broker, filed an "Application for Retirement Insurance Benefits" on September 25, 1967 (Tr. 86-89).<sup>\*</sup> On March 29, 1970, Cohen filed a second application, which was explicitly limited to a request for Medicare coverage (Tr. 90-93). Cohen noted in this second application that his prior application was also limited to a request for Medicare benefits (Tr. 90).

In June 1971, at the age of 68, Cohen sold his insurance business and thereafter applied for retirement insurance benefits commencing June 1971 (Tr. 94). The application was initially denied on April 18, 1974, save for two months (October and November 1972) for which Cohen had submitted proof of hospitalization. In response to Cohen's request for reconsideration, the Bureau of Retirement and Survivor's Insurance ("the Bureau") reviewed Cohen's application for benefits. By reconsideration determination dated September 23, 1974, the Bureau found that Cohen was not entitled to retirement insurance benefits for the

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<sup>\*</sup> "Tr." refers to the transcript of the administrative record before the Social Security Administration, a certified copy of which was filed as part of the Secretary's answer to the complaint in the District Court pursuant to 42 U.S.C. § 405(g). Four copies of the transcript have been filed with this Court and designated as exhibits pursuant to Rule 30(e) of the Federal Rules of Appellate Procedure.



period June 1971 through August 1974 save for those months during that period for which Cohen had submitted evidence of hospitalization (Tr. 99-100).<sup>\*</sup> The Bureau further found that Cohen would be entitled to retirement benefits commencing September 1974, the month during which he would attain 72 years of age (*Id.*).

Cohen thereafter requested a hearing before an Administrative Law Judge (Tr. 101), and a hearing was held on February 27, 1975 (Tr. 17-85). The Administrative Law Judge before whom Cohen appeared considered the case *de novo* and rendered a decision on April 4, 1975. The Administrative Law Judge found that Cohen was not entitled to benefits for the period June 1971 through January 1972 but was entitled to benefits for the period from February 1972 to date (Tr. 9-13). This decision was upheld on August 5, 1975, upon review by the Appeals Council, Bureau of Hearings and Appeals, Department of Health, Education and Welfare, and, consequently, became the final decision of the Secretary (Tr. 3).

Cohen filed a complaint seeking review of the Secretary's decision in the United States District Court for the Southern District of New York on November 25, 1975.<sup>\*\*</sup> Issue was joined on April 20, 1976 by the filing of the Secretary's answer and a certified copy of the

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<sup>\*</sup> The Bureau found that, in addition to October and November 1972 for which benefits had already been granted, satisfactory evidence of hospitalization had been provided for July 1972 through September 1972, December 1972, January 1973 and September 1973 through October 1973.

<sup>\*\*</sup> The Bureau of Hearings and Appeals sent Cohen a letter notifying him of the Appeals Council decision on August 5, 1975, but this letter was returned. Cohen did not receive actual notice of the decision until September 1, 1975. Thus, Cohen's complaint was timely filed in the District Court on November 25, 1975. See 42 U.S.C. § 405(g); 20 C.F.R. § 404.954(g).

transcript of the administrative record upon which the Secretary's decision was based. On September 17, 1976, the Secretary moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

By an opinion and order filed February 24, 1977, the District Court granted the Secretary's motion. Judgment was entered accordingly on February 25, 1977.

Cohen filed a notice of appeal on March 28, 1977. The appeal was dismissed by order of the Clerk of this Court on July 11, 1977 upon Cohen's failure to file his brief and appendix as required by the scheduling order of this Court dated April 6, 1977. Cohen's motion for reinstatement of the appeal was granted by order of this Court on October 31, 1977.

#### **B. Statement of Facts**

Cohen was born on September 26, 1902 and was engaged in the insurance business for over 40 years of his life (Tr. 23, 103). Since 1967, Cohen had worked two days a week, seven hours a day (Tr. 148). In June of 1971, at the age of 68, Cohen sold his "one-man insurance business" to Hofbar Associates Inc. ("Hofbar") (Tr. 23, 104). According to the written agreement of sale, Cohen was obligated to work at least two days a week (Tr. 106-07). Cohen testified, however, that he did not meet his obligation fully "in the beginning" (Tr. 36). He stated that he was treated "shabbily" by Hofbar, and that he was ultimately thrown out of Hofbar's offices in December of 1971 (Tr. 31-32, 36, 74). He also testified that he had been suffering from emotional stress prior to the sale of his insurance business, that his illness continued thereafter and that this problem reduced his capa-



city to function at his work (Tr. 23-30, 52-55). For example, he indicated that he would fail to bill customers, to follow up leads or to consummate deals and that "it got to a point where [I] just hated going into the office" (Tr. 24-26). But he stated that he began "to feel better" and that by the time Hofbar threw him out he had "started working steadily" and "had been coming in every day" (Tr. 36, 74).

Cohen testified that the only income he received attributable to new business from June 1971 to September 1974 was \$48,700, comprised of a \$1,700 commission on a lease to Liberty Travel and a \$47,000 commission covering two life insurance policies (Tr. 58).<sup>\*</sup> However, he indicated at another point in his testimony that he had also received \$1,400 in commissions from Hofbar (Tr. 32).

Cohen worked on the Liberty Travel lease for five months, from March 1971 through August 1971 (Tr. 52). His activities involved making telephone calls every few weeks to the landlord and to the prospective tenant until the deal was finalized. In a letter to the Administrative Law Judge after the decision on his hearing was rendered, Cohen added that he may have also made "3 or 4 personal calls on Liberty Travel" (Tr. 6). He received his commission on this lease in August 1971.

The life insurance transaction extended from August 1971 through January 1972 (Tr. 54). As a result of this transaction, insurance policies were issued on the lives of two partners of Mohawk Constructors (Tr. 53). For his work on this deal, Cohen received a total of

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<sup>\*</sup> Cohen noted that the \$47,000 represented only the initial commission on these policies. With renewals stretching over a nine-year period, the total commission amounted to \$120,000 (Tr. 35, 57).



\$47,000 in initial commissions, of which approximately \$24,000 or \$26,000 was received in November 1971 and the remainder of which was received in 1972 (Tr. 44, 53). Despite his receipt of the commissions, Cohen claimed that he did little or no work on this transaction (Tr. 6-7, 42, 54). He testified that the transaction was initiated by a telephone call from one of his customers, that owing to his emotional problems he failed to keep appointments, and was forced to seek the assistance of two insurance agencies in order to complete the deal (Tr. 34-36). He stated that other than a number of telephone calls his only activities were two meetings with the partners whose lives were insured (Tr. 6-7, 34-36, 54-55). On one occasion, apparently on the first policy issued, he travelled with an agent from the John A. Newman Agency to Newark, New Jersey (Tr. 7, 36). On another occasion, apparently on the second policy issued, he was driven by his wife to the Plaza Hotel in New York City (Tr. 7, 55). Cohen submitted a letter dated April 2, 1974 from the John A. Newman Agency of the National Life Insurance Company which indicated that the applications on the two policies were "secured for [sic] by this office and particularly by Mr. John A. Newman as Mr. Cohen was unable to complete the transaction" (Tr. 182).

After he was thrown out of Hofbar in December 1971, the John A. Newman Agency provided Cohen with an office for a number of months at some point during the period January 1972 to May 1972 (Tr. 73, 75). But Cohen stated that he was ill and did not work during this period (Tr. 73). Thereafter he went to New Britain, Connecticut where he was given an office rent-free by Mag Realty (Tr. 68-69, 76). Cohen claimed that he used this office only once, at which time he placed two telephone calls (Tr. 69-70). He also stated he "drove around to see some customers" but never kept return appointments with them, attributing his inability to function to his emotional problems (Tr. 70). He returned to New York

after approximately four months in Connecticut and claimed that he had no jobs thereafter (Tr. 69, 72-74).

Following his return to New York, Cohen was hospitalized on a number of occasions. As supported by documentation in the administrative record, Cohen was an inpatient at Mount Sinai Hospital from July 21, 1972 to December 12, 1972, January 2, 1973 to January 17, 1973, and September 7, 1973 to October 17, 1973 with a diagnosis of manic depression of the circular type (Tr. 174-77).

With respect to income earned for the years in issue herein, i.e., 1971 and 1972, the record contains copies of Cohen's federal income tax returns for those years (Tr. 110-31) and two letters reflecting commissions earned by Cohen for policies issued on behalf of the John Hancock Mutual Life Insurance Company and the National Life Insurance Company (Tr. 180-81). The 1971 tax return shows net business income of \$14,615.88\* and total business deductions of \$3,735.19, including substantial sums expended for travel and entertainment (\$1,393.55) for telephone (\$914.94) and for advertising (\$248.62) (Tr. 111, 114). The 1972 tax return shows net business income of \$27,402.95 and total business expenses of \$2,274.30, including a "Business Solicitation" figure of \$1,682.32 (Tr. 122, 125). The John Hancock letter shows that a total of \$12,224.76 and \$2,868.66 in commissions were paid in 1971 and 1972, respectively. The National Life Insurance Company letter shows that a total of \$27,388.89 was earned in 1972, which was solely attributable to the life insurance policies issued on the lives of the Mohawk Constructors' partners.

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\* This total net figure appears at line 34 of the return (Tr. 111) based on the figure set forth at line 20 of Schedule C (Tr. 114). Curiously, no income figures appear in Schedule C.



The Administrative Law Judge before whom Cohen appeared concluded that Cohen (1) was not entitled to retirement insurance benefits for the period June 1971 through January 1972 because Cohen had rendered "substantial services" in self-employment during that period and his earnings for 1971 and 1972 exceeded the benefits which would otherwise have been allowable for those months; (2) was entitled to retirement insurance benefits for the period February 1972 through August 1974 because Cohen had either not rendered "substantial services" or had been hospitalized during this period; and (3) was entitled to retirement insurance benefits after September 1974 since he had reached age 72 in September 1974.\* Cohen contests, and this appeal is limited to, conclusion (1) above.

### Relevant Statutes and Regulations

Social Security Act, Section 202(a), 42 U.S.C. § 402(a):

(a) Every individual who—

(1) is a fully insured individual (as defined in section 414(a) of this title),

(2) has attained age 62, and

(3) has filed application for old-age insurance benefits or was entitled to disability insurance benefits for the month preceding the month in which he attained the age of 65,

shall be entitled to an old-age insurance benefit for each month, beginning with the first month after August 1950 in which such individual becomes so entitled to such insurance benefits and ending with the month preceding the month in which he dies. . . .

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\* See 42 U.S.C. § 403(f)(1)(B); 20 C.F.R. § 404.435(a)(3).



Social Security Act, Section 203(b), 42 U.S.C.  
§ 403(b) :

Deductions on account of work

(b) Deductions, in such amounts and at such time or times as the Secretary shall determine, shall be made from any payment or payments under this subchapter to which an individual is entitled, and from any payment or payments to which any other persons are entitled on the basis of such individual's wages and self-employment income, until the total of such deductions equals—

(1) such individual's benefit or benefits under section 402 of this title for any month, . . . if for such month he is charged with excess earnings, under the provisions of subsection (f) of this section, equal to the total of benefits referred to in clauses (1) and (2). If the excess earnings so charged are less than such total of benefits, such deductions with respect to such month shall be equal only to the amount of such excess earnings.

Social Security Act § 203(f), 42 U.S.C. § 403(f) :

Months to which earnings are charged

(f) For purposes of subsection (b) of this section—

(1) The amount of an individual's excess earnings (as defined in paragraph (3)) shall be charged to months as follows: There shall be charged to the first month of such taxable year an amount of his excess earnings equal to the sum of the payments to which he and all other persons are entitled for such month under section 402 of this title on the basis of his wages and self-employment income (or the total of his excess earnings if such excess earnings are less than such sum), and the balance, if any, of such

excess earnings shall be charged to each succeeding month in such year to the extent, in the case of each such month, of the sum of the payments to which such individual and all other persons are entitled for such month under section 402 of this title on the basis of his wages and self-employment income, until the total of such excess has been so charged. . . . Notwithstanding the preceding provisions of this paragraph . . . , no part of the excess earnings of an individual shall be charged to any month . . . (B) in which such individual was age seventy-two or over, . . . or (E) in which such individual did not engage in self-employment and did not render services for wages (determined as provided in paragraph (5) of this subsection) of more than \$200 or the exempt amount as determined under paragraph (8).

(2) As used in paragraph (1), the term "first month of such taxable year" means the earliest month in such year to which the charging of excess earnings described in such paragraph is not prohibited by the application of clauses (A), (B), (C), (D), and (E) thereof.

(3) For purposes of paragraph (1) and subsection (h) of this section, an individual's excess earnings for a taxable year shall be 50 per centum of his earnings for such year in excess of the product of \$200 or the exempt amount as determined under paragraph (8), multiplied by the number of months in such year, except that, in determining an individual's excess earnings for the taxable year in which he attains age 72, there shall be excluded any earnings of such individual for the month in which he attains such age and any subsequent month (with any net earnings or net loss from self-employment in such



year being prorated in an equitable manner under regulations of the Secretary). The excess earnings as derived under the preceding sentence, if not a multiple of \$1, shall be reduced to the next lower multiple of \$1.

(4) For purposes of clause (E) of paragraph (1)—

(A) An individual will be presumed, with respect to any month, to have been engaged in self-employment in such month until it is shown to the satisfaction of the Secretary that such individual rendered no substantial services in such month with respect to any trade or business the net income or loss of which is includible in computing (as provided in paragraph (5) of this subsection) his net earnings or net loss from self-employment for any taxable year. The Secretary shall by regulations prescribe the methods and criteria for determining whether or not an individual has rendered substantial services with respect to any trade or business.

(B) An individual will be presumed, with respect to any month, to have rendered services for wages (determined as provided in paragraph (5) of this subsection) of more than \$200 or the exempt amount as determined under paragraph (8) until it is shown to the satisfaction of the Secretary that such individual did not render such services in such month for more than such amount.

(5) (A) An individual's earnings for a taxable year shall be (i) the sum of his wages for services rendered in such year and his net earnings from self-employment for such year, minus



(ii) any net loss from self-employment for such year.\*

20 C.F.R. § 404.415:

§ 404.415 Deductions because of excess earnings; annual earnings test.

(a) *Deductions because of beneficiary's earnings.* Under the annual earnings test, deductions are made from monthly benefits . . . payable to a beneficiary for each month in a taxable year beginning after December 1954 in which the beneficiary is under age 72 and to which excess earnings are charged under the provisions described in § 404.434 or § 404.444.

20 C.F.R. § 404.428:

§ 404.428 Earnings in a taxable year.

(a) *General.* In applying the annual earnings test (see § 404.415(a)) under the provisions of this subpart, all of a beneficiary's earnings (as defined in § 404.429) for all months of his taxable year are included even though the individual is not entitled to benefits during all months of his taxable year. . . .

(b) *When derived.* Wages as defined in § 404.429(c) are derived and includable as earnings for the months and year in which the beneficiary rendered the services. Net earnings from self-employment, or net losses therefrom, are derived, or incurred, and are includable as earnings or losses, in the year for which such earnings or losses are reportable for Federal income tax purposes.

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\* During the period in issue on this appeal, the \$200 figure appearing herein in subsections (1), (3) and (4)(B) of 42 U.S.C. § 403(f) was \$140.

## 20 C.F.R. § 404.429:

§ 404.429 Earnings; defined.

(a) *General.* When the term "earnings" is used in this subpart other than as a part of the phrase "net earnings from self-employment," it means an individual's earnings for a taxable year after 1954. It includes the sum of his wages for services rendered in such year, and his net earnings from self-employment for the taxable year, minus any net loss from self-employment for the same taxable year.

## 20 C.F.R. § 404.431:

§ 404.431 Excess earnings; defined for taxable years ending after December 1967 and prior to January 1973.

For taxable years ending after December 1967 and prior to January 1973, an individual's excess earnings are the amount of his earnings (as described in § 404.429) that exceed \$140 times the number of months in his taxable year, except that his excess earnings do not include an amount equal to one-half of the first \$1,200 of such excess amount (or equal to one-half of the entire excess amount if such excess amount is less than \$1,200). Where the excess amount so figured is not a multiple of \$1, it is reduced to the next lower dollar. Thus, in the usual 12-month-taxable-year case, an individual's excess earnings are computed as follows:

(a) \$1 for each \$2 of earnings over \$1,680, up to and including \$2,880; and

(b) \$1 for each \$1 of earnings over \$2,880.



## 20 C.F.R. § 404.434:

§ 404.434 Excess earnings; method of charging.

(a) *Months charged.* For purposes of imposing deductions for taxable years after 1960, the excess earnings (as described in §§ 404.430, 404.431, 404.432, and 404.433) of an individual are charged to each month beginning with the first month the individual is entitled in the taxable year in question and continuing, if necessary, to each succeeding month in such taxable year until all of the individual's excess earnings have been charged. Excess earnings, however, are not charged to any month described in §§ 404.435 and 404.436.

(b) *Amount of excess earnings charged—(1) Insured individual's excess earnings.* The insured individual's excess earnings are charged on the basis of \$1 of excess earnings for each \$1 of monthly benefits to which he and all other persons are entitled (or deemed entitled—see § 404.420) for such month on the insured individual's earnings record. (See § 404.439 where the excess earnings for a month are less than the total benefits payable for that month.)

## 20 C.F.R. § 404.435:

§ 404.435 Excess earnings; months to which excess earnings cannot be charged.

(a) *Taxable years ending after 1965.* Notwithstanding any of the provisions described in this subpart, an individual's excess earnings in a taxable year ending after 1965 are not charged to any month in which he:

(3) Was age 72 or over;

. . .



(6) Did not engage in self-employment (see paragraphs (c) and (e) of this section) and did not render services for wages (see paragraph (d) of this section) of more than \$175 in a taxable year ending after December 1972, or more than \$140 in a taxable year ending after December 1967 and prior to January 1973 (or \$125 in a taxable year ending after 1965 and before January 1968); or

(c) *When an individual is deemed to have engaged in self-employment.* An individual is deemed to have engaged in self-employment in any month in which he renders substantial services (as defined in § 404.446) in the operation of a trade or business (or in a combination of trades and businesses if there are more than one) as owner or partner even though there may be no earnings or net earnings from self-employment attributable to his services for such month.

(d) *Presumption regarding "services for wages."* With respect to paragraphs (a) (6) and (b) (6) of this section, and § 404.444(c) (5), an individual is presumed to have rendered services in any month for wages (as defined in § 404.429) of more than \$175, or more than \$140, or more than \$125, or more than \$100 or more than \$80, whichever amount is applicable, until it is shown to the satisfaction of the Administration that the individual did not render services in such month for more than such amount.

(e) *Presumption regarding "engaged in self-employment."* With respect to paragraphs (a) (6) and (b) (6) of this section, and § 404.444(c) (5), an individual is presumed to have engaged in self-employment in each month of his taxable year until it is shown to the satisfaction of the Administration

that in a particular month he did not render substantial services (see § 404.446(c)) with respect to any trade or business (or in a combination of trades and businesses if there are more than one) the net income or loss of which is includable in computing his earnings as defined in § 404.429.

20 C.F.R. § 404.446:

§ 404.446 Definition of "substantial services."

(a) *General.* In general, the substantial services test is one of whether, in view of all the services rendered by the individual and the surrounding circumstances, the individual can reasonably be considered retired in the month in question. Even though an individual performs some services in a trade or business in a month, such services are not substantial where the evidence establishes to the satisfaction of the Administration that the individual may reasonably be considered retired in that month. In determining whether an individual has or has not performed substantial services in any month, the following factors are considered:

- (1) The amount of time the individual devoted to all trades and businesses;
- (2) The nature of the services rendered by the individual;
- (3) The extent and nature of the activity performed by the individual before he allegedly retired as compared with that performed thereafter;
- (4) The presence or absence of an adequately qualified paid manager, partner, or family member who manages the business;
- (5) The type of business establishment involved;



(6) The amount of capital invested in the trade or business; and

(7) The seasonal nature of the trade or business.

(b) *Individual engaged in more than one trade or business.* When an individual, in any month, performs services in more than one trade or business, his services in all trades or businesses are considered together in determining whether he performed substantial services in self-employment in such month.

(c) *Evidentiary requirements.* An individual who alleges that he did not render substantial services in any month, or months, shall submit detailed information about the operation of the trades or businesses, including the individual's activities in connection therewith. When requested to do so by the Administration, the individual shall also submit such additional statements, information, and other evidence as the Administration may consider necessary for a proper determination of whether the individual rendered substantial services in self-employment. Failure of the individual to submit the requested statements, information, and other evidence is a sufficient basis for a determination that the individual rendered substantial services in self-employment during the period in question.

20 C.F.R. § 404.447:

§ 404.447 Evaluation of factors involved in substantial services test.

In determining whether an individual's services are substantial, consideration is given to the following factors:

(a) *Amount of time devoted to trades or businesses.* Consideration is first given to the amount of time the self-employed individual devotes to all trades or businesses, the net income or loss of which is includable in computing his earnings as defined in § 404.429. For the purposes of this paragraph, the time devoted to a trade or business includes all the time spent by the individual in any activity, whether physical or mental, at the place of business or elsewhere in furtherance of such trade or business. This includes the time spent in advising and planning the operation of the business, making business contacts, attending meetings, and preparing and maintaining the facilities and records of the business. All time spent at the place of business which cannot reasonably be considered unrelated to business activities is considered time devoted to the trade or business. In considering the weight to be given to the time devoted to trades or businesses the following rules are applied:

(1) *Forty-five hours or less in a month devoted to trade or business.* Where the individual establishes that the time devoted to his trades and businesses during a calendar month was not more than 45 hours, the individual's services in that month are not considered substantial unless other factors (see paragraphs (b), (c), and (d) of this section), make such a finding unreasonable. For example, an individual who worked only 15 hours in a month might nevertheless be found to have rendered substantial services if he was managing a sizeable business or engaging in a highly skilled occupation. However, the services of less than 15 hours rendered in all trades and businesses during a calendar month are not substantial.

(2) *More than 45 hours in a month devoted to trades and businesses.* Where an individual devotes more than 45 hours to all trades and businesses



during a calendar month, it will be found that the individual's services are substantial unless it is established that the individual could reasonably be considered retired in the month and, therefore, that such services were not, in fact, substantial.

(b) *Nature of services rendered.* Consideration is also given to the nature of the services rendered by the individual in any case where a finding that the individual was retired would be unreasonable if based on time alone (see paragraph (a) of this section). The more highly skilled and valuable his services in self-employment are, the more likely the individual rendering such services could not reasonably be considered retired. The performance of services regularly also tends to show that the individual has not retired. Services are considered in relation to the technical and management needs of the business in which they are rendered. Thus, skilled services of a managerial or technical nature may be so important to the conduct of a sizable business that such services would be substantial even though the time required to render the services is considerably less than 45 hours.

(c) *Comparison of services rendered before and after retirement.* Where consideration of the amount of time devoted to a trade or business (see paragraph (a) of this section) and the nature of services rendered (see paragraph (b) of this section) is not sufficient to establish whether an individual's services were substantial, consideration is given to the extent and nature of the services rendered by the individual before his "retirement," as compared with the services performed during the period in question. A significant reduction in the amount or importance of services rendered in the business tends to show that the individual is retired; absence of such reduction tends to show that the individual is not retired.

(d) *Setting in which services performed.* Where consideration of the factors described in paragraphs (a), (b), and (c) of this section is not sufficient to establish that an individual's services in self-employment were or were not substantial, all other factors are considered. The presence or absence of a capable manager, the kind and size of the business, the amount of capital invested and whether the business is seasonal, as well as any other pertinent factors, are considered in determining whether the individual's services are such that he can reasonably be considered retired.

## ARGUMENT

### POINT I

**The Secretary's Decision Is Supported By Substantial Evidence and Should Be Affirmed.**

#### A. The Scope of Review

Judicial review of the Secretary's decision is limited to a determination of whether the decision is supported by substantial evidence. 42 U.S.C. § 405(g); *Richardson v. Perales*, 402 U.S. 389 (1971); *Gold v. Secretary of HEW*, 463 F.2d 38 (2d Cir. 1972); *Franklin v. Secretary of HEW*, 393 F.2d 640 (2d Cir. 1968); *Rivas v. Weinberger*, 475 F.2d 255 (5th Cir. 1973). If the Court finds that there is such evidence, the Secretary's decision must be upheld even if there is also substantial evidence for the plaintiff's position. *Howard v. Weinberger*, 489 F.2d 216 (5th Cir. 1974).

There need be no clear-cut preponderance in favor of the Secretary:

Where there is only a slight preponderance of the evidence on one side or the other, the Secretary's



findings should be affirmed. *Selig v. Richardson*, 379 F. Supp. 594, 598 (E.D.N.Y. 1974). See also *Underwood v. Ribicoff*, 298 F.2d 850, 851 (4th Cir. 1962).

The reviewing court may not try the case *de novo* or substitute its findings for those of the Secretary. *Franklin v. Secretary of HEW*, *supra*. The Secretary's findings of fact, as well as the inferences and conclusions to be drawn from those findings, are conclusive, *Levine v. Gardner*, 360 F.2d 727, 730 (2d Cir. 1966); *McHale v. Mathews*, 416 F. Supp. 1191, 1192 (S.D.N.Y. 1976), even in those instances where a reviewing court has suggested that the court's independent analysis of the evidence differed from the Secretary's analysis, *Reading v. Mathews*, 542 F.2d 993, 997 (7th Cir. 1976). Thus it is for the Secretary alone to resolve conflicts in the evidence, *Richardson v. Perales*, *supra*, and to pass upon the credibility of witnesses. *Dolan v. Celebrezze*, 381 F.2d 231 (2d Cir. 1967); *Kerner v. Celebrezze*, 340 F.2d 736 (2d Cir.), *cert. denied*, 382 U.S. 861 (1965).

## B. Plaintiff's Burden of Proof

The burden is upon the plaintiff to establish entitlement to retirement insurance benefits. *Carlson v. Richardson*, 331 F. Supp. 1000, 1002 (D. Conn. 1971); *Covo v. Gardner*, 314 F. Supp. 894, 898 (S.D.N.Y. 1970). He must first satisfy the initial statutory criteria for entitlement, *i.e.*, (1) fully insured status, (2) age 62 or over and (3) a filed application for benefits. See 42 U.S.C. § 402(a). There is no question that Cohen met these criteria. But a plaintiff must also establish that deductions from the benefits to which he would otherwise be entitled are not warranted. See *Carlson v. Richardson*, *supra*. It is this latter element of a plaintiff's burden in a retirement insurance benefits case which Cohen failed to meet.

Section 203(b) of the Social Security Act ("the Act"), 42 U.S.C. § 403(b), provides that if a recipient of old age retirement benefits continues to receive earnings after becoming entitled to benefits, deductions are to be imposed against such benefits until the amount of the deductions equals the amount of the excess earnings as determined under § 203(f) of the Act, 42 U.S.C. § 403(f). Excess earnings during the time period at issue in the instant case (June 1971 to January 1972) were computed according to the following formula: If an entitled individual had annual earnings of more than \$1,680, then one dollar for each two dollars of earnings between \$1,680 and \$2,880, and one dollar for each dollar over \$2,880, would be deducted for those months in which the entitled individual was under age 72 and either worked for wages of more than \$140 a month or rendered substantial services in self-employment. See 20 C.F.R. § 404.431. Section 203(f)(4) of the Act, 42 U.S.C. § 403(f)(4), creates a presumption that an individual having excess earnings in a given year is engaged in self-employment or has rendered services for wages in each month of such year, unless the contrary can be shown to the satisfaction of the Secretary. See *Carlson v. Richardson*, *supra*, 331 F. Supp. at 1001-02. Pursuant to the authority provided in Section 203(f)(4)(A) of the Act, 42 U.S.C. § 403(f)(4)(A), the Secretary has promulgated regulations defining "substantial services" and setting forth criteria for evaluating whether an individual has rendered substantial services in a given instance. See 20 C.F.R. §§ 404.446 and 404.447.

### C. The Secretary's Findings and Their Evidentiary Bases

In the instant case, the Secretary found that Cohen had rendered substantial services in self-employment as a self-employed insurance broker during the period June 1971 through January 1972 (Tr. 12-13). In making this finding, the Secretary relied upon Cohen's activities



in connection with the Liberty Travel lease and the life insurance policies for Mohawk Constructors (Tr. 12). The Secretary further found that Cohen's excess earnings for 1971 and 1972 exceeded the benefits which would otherwise be paid to him for the months in question, and, therefore, denied Cohen's claim for benefits in those months. The District Court upheld the Secretary's findings and conclusions, noting that there "is more than substantial evidence to sustain" them. Addendum at 1a.

In assessing the Secretary's finding that Cohen rendered substantial services in self-employment, the starting point must be the Secretary's regulations governing the meaning of substantial services. Thus, 20 C.F.R. § 404.446(a) provides in relevant part that the test is "whether, in view of all the services rendered by the individual and the surrounding circumstances, the individual can reasonably be considered retired in the month in question". The section then lists seven factors which are to be considered in determining whether substantial services have been rendered. The second and third factors are particularly germane to the facts of this case:

- (2) The nature of the services rendered by the individual;
- (3) The extent and nature of the activity performed by the individual before he allegedly retired as compared with that performed thereafter;

The meaning of these factors is elaborated upon in section 404.447. Subsection (a) of that section requires that "[c]onsideration be first given to the amount of time the self-employed individual devotes to all trades and businesses." Subsections (b) and (c) then provide:

(b) *Nature of services rendered. Consideration is also given to the nature of the services ren-*

dered by the individual in any case where a finding that the individual was retired would be unreasonable if based on time alone (see paragraph (a) of this section). The more highly skilled and valuable his services in self-employment are, the more likely the individual rendering such services could not reasonably be considered retired. The performance of services regularly also tends to show that the individual has not retired. Services are considered in relation to the technical and management needs of the business in which they are rendered. Thus, skilled services of a managerial or technical nature may be so important to the conduct of a sizable business that such services would be substantial even though the time required to render the services is considerably less than 45 hours.

(c) *Comparison of services rendered before and after retirement.* Where consideration of the amount of time devoted to a trade or business (see paragraph (a) of this section) and the nature of services rendered (see paragraph (b) of this section) is not sufficient to establish whether an individual's services were substantial, consideration is given to the extent and nature of the services rendered by the individual before his "retirement," as compared with the services performed during the period in question. Importance of services rendered in the business tends to show that the individual is retired; absence of such reduction tends to show that the individual is not retired. [Emphasis added].

It is clear from the record that the nature of Cohen's activities remained unchanged after June 1971 when he assertedly retired after "giving" his business away to Hofbar (Tr. 23). It is apparent that as an insurance broker the amount of time Cohen devoted to his work on a daily basis did not necessarily bear upon the income



he could earn. It is the nature of such work that a substantial investment of time and effort may yield nothing in return but that a few well-placed calls or appointments may reap a substantial commission. Moreover, it is noteworthy that the amount of time spent by Cohen at his job was not sizeable even before he allegedly retired. He stated that since 1967 he had worked but two days a week, seven hours a day (Tr. 148).

As noted earlier, Cohen's activities in securing the Liberty Travel lease involved telephone conversations every few weeks and a number of personal visits to the prospective tenant over a period of five months, from March through August 1971 (Tr. 6, 52). The services rendered were clearly of the same nature he had always rendered as an insurance broker. In return for his allegedly limited services, he received a \$1,700 commission in August of 1971.

In describing his activities regarding the life insurance policies, Cohen sought to minimize his role in developing and closing the deal. He stated that his role was limited to receiving the initial telephone request from one of his customers, taking a number of additional telephone calls, and making two trips to meet the clients, once with the agents of the John A. Newman Agency and a second time with his wife (Tr. 6-7, 34-36, 52-55). Nonetheless, he received a handsome return on his services: \$47,000 in initial commissions, approximately half of which was received in November 1971 and the remainder in 1972. Adding renewal commissions to be received over a nine-year period, these two policies alone were worth \$120,000 to Cohen.\*

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\* Moreover, although not relied upon by the Secretary, there is ample additional evidence in the record to support the conclusion that Cohen was not "retired" from June 1971 through at least December 1971 based on his activities at Hofbar. While

[Footnote continued on following page]

Additionally, Cohen's claim that he did not render substantial services in the period in question is belied by the sizeable business deductions taken in both 1971 and 1972. In 1971 he claimed a total of \$3,735.19 for his one-man insurance business (Tr. 114). In 1972, despite his contention that he did practically nothing the entire year in addition to being hospitalized from July through December, he claimed \$2,274.30 including a "Business Solicitation" figure of \$1,682.32 (Tr. 125). These are hardly deductions taken by a retiree.

Since substantial services were rendered by Cohen from June 1971 through January 1972 and since his excess earnings for both years considerably exceeded the benefits for those months, Cohen's claim for benefits in those months must fail.

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asserting that "in the beginning" he did not work two days a week as required in his contract with Hofbar, he admits that he worked almost daily at Hofbar thereafter (Tr. 36, 74). In return for these activities, he received a \$1,400 commission from Hofbar (Tr. 32). Whether one views these activities as evidence of self-employment services or as services rendered as an employee of Hofbar, deductions from Cohen's benefits from June 1971 until he was "kicked out" of Hofbar in December 1971 are appropriate. Based on Cohen's testimony it appears that in some months he worked slightly more than 45 hours a month and in others slightly fewer. Services for more than 45 hours a month are treated as presumptively substantial under 20 C.F.R. § 404.447 (a)(2), and services between 15 and 45 hours are still considered substantial under C.F.R. § 404.447(a)(1) if, for example, they are rendered by a highly skilled individual, such as an insurance salesman. If Cohen's services are on the other hand viewed as those of an employee, it is equally clear that deductions are required for his months at Hofbar since his "wages", i.e., the \$1,400 in commissions earned during this period, are well in excess of \$140 a month for the seven months in question. At the time Cohen rendered these services (1971), if wages in excess of \$140 per month were earned by the individual, deductions from the benefits for those months were required under 42 U.S.C. § 403(f)(1)(E); *see also* 20 C.F.R. § 404.435(d).



## CONCLUSION

It is respectfully submitted that the Secretary's determination is supported by substantial evidence and the decision of the District Court must be affirmed.

Dated: New York, New York  
February 21, 1978

Respectfully submitted,

ROBERT B. FISKE, JR.  
*United States Attorney for the  
Southern District of New York  
Attorney for Defendant-Appellee*

LESLIE R. BENNETT  
LOUIS G. CORSI  
PATRICK H. BARTH  
*Assistant United States Attorneys  
Of Counsel*

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**ADDENDUM**

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

75 Civ. 5948 (CSH)

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MERVIN J. COHEN

*Plaintiff,*

— *against* —

DAVID MATHEWS, Secretary of Health,  
Education, and Welfare

*Defendant.*

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HAIGHT, *District Judge:*

Plaintiff has commenced the above-entitled action pursuant to § 205(g) of the Social Security Act, as amended, 42 U.S.C. § 405(g), to review a final determination of the Secretary of Health, Education and Welfare, relevant to Plaintiff's claim for retirement insurance benefits for the period March 1971 through January 1972, which was denied, after administrative review, in a decision by Administrative Law Judge Milton Pravitz, and affirmed by the Appeals Council of the Social Security Administration.

In a suit brought under § 205(g), the Court's function is a limited one—to review the administrative record, and determine whether there is substantial evidence to support the decision of the administrative agency. See *Richardson v. Perales*, 402 U.S. 389 (1971). This the Court has done, and I conclude, as a matter of law, that there is more than substantial evidence to sustain the conclusions of both fact and law found by Judge Pravitz.

The administrative decision which serves as the basis of the instant suit represents, in essence, a determination by the Social Security Administration to award substantial benefits to plaintiff—benefits which had been previously denied by the Administration. Originally, plaintiff had sought retirement benefits for the years 1971, 1972 and 1973. This claim was denied by the Administration; such ruling being affirmed under a subsequent “Reconsideration Determination”. It was only after a full hearing before Judge Pravitz, did plaintiff receive partial relief and an award of benefits for the period commencing February, 1972.

There is little to be gained by a recital of the facts herein, which I might add have been set forth with painstaking specificity by Judge Pravitz in his decision. This Court has engaged in its own *de novo* review of the record and the exhibits therein—the evidence brought forth at plaintiff’s hearing clearly sustains the determination of the Administrative Law Judge as to plaintiff’s ineligibility for retirement benefits for the period in question. I therefore grant defendant’s motion for judgment on the pleadings pursuant to Rule 12(c), F.R.C.P.

It is So Ordered.

Dated: New York, New York  
February 23, 1977

/s/ CHARLES S. HAIGHT, JR.  
CHARLES S. HAIGHT, JR.  
U.S.D.J.



AFFIDAVIT OF MAILING

State of New York )  
County of New York ) ss

Marian J. Bryant being duly sworn,  
deposes and says that she is employed in the Office of the  
United States Attorney for the Southern District of New York.

That on the \_\_\_\_\_  
two copies  
21st day of February 19 78 s he served ~~a copy~~ of the  
within Appellee's Brief

by placing the same in a properly postpaid franked envelope addressed:

Mervin Cohen  
350 Cabrini Boulevard  
New York, New York 10040

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

Marian F. Bryant

21st day of February, 19 78

Qualified in New York County  
Commission Expires March 30, 1978